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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition	))))))))	CC Docket No. 99-142

JOINT REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, NET2000 COMMUNICATIONS, INC., AND TELIGENT, INC.

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June 18, 1999

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The Association for Local Telecommunications Services ("ALTS"), Net2000 Communications, Inc. ("Net2000"), and Teligent, Inc. ("Teligent") (collectively, "Joint Commenters") hereby submit their joint reply comments in the above-captioned proceeding.[1]

With the exception of some ILEC oppositions, the responses to the KMC Petition uniformly demonstrated that ILEC termination penalties can be so excessive as to impair the provision of telecommunications services by competitive local exchange carriers.[2] MGC Communications, Inc. stated that "up to 25

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1 The Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition, CC Docket No. 99-142, *KMC Telecom Inc. Petition for Declaratory Ruling* (filed April 26, 1999)("KMC Petition").

2 See, e.g., Comments of Allegiance Telecom, Inc., Choice One Communications and Hyperion Telecommunications, Inc., Columbia Telecommunications, Inc., CTSI, Inc. and RCN

percent of customers who desire to switch to MGC's services find they are subject to excessive termination penalties preventing them from switching to MGC."[3] Even Sprint, which has incumbent local exchange operations in some geographic territories, acknowledged that "some long-term contracts or service arrangements, with their attendant termination liabilities, have the potential to be used as tools to defeat emerging competition."[4]

Notwithstanding ILEC arguments to the contrary,[5] these penalties are not restricted to the contracts of large business consumers. Teligent, for example, targets small to medium-sized businesses and has encountered potential customers trapped by excessive ILEC termination penalties. Similarly, McLeodUSA explained that it, too, has had experience with excessive ILEC termination penalties affecting small businesses.[6]

Telecom Services, Inc., Fairpoint Communications Corp., McLeodUSA Telecommunications Services, Inc., MGC Communications, Inc., Qwest Communications Corporation, Telecommunications Resellers Association, and WinStar Communications, Inc.

3 Comments of MGC Communications, Inc. at 6.

4 Comments of Sprint Corporation at 2. Another ILEC, too, concedes that there may be instances in which termination penalties can "present a serious threat to competition." Comments of Alaska Communications Systems at 4.

5 See, e.g., Comments of BellSouth Corporation at 6; Comments of GTE at 3-4.

6 Comments of McLeodUSA Telecommunications Services, Inc. at 3.

Many CLECs and ILECs alike agreed with the Joint Commenters that ILEC termination penalties are not per se unreasonable.[7] But, the opponents to the KMC Petition overstate this proposition. The proposition that ILEC termination penalties are not per se unreasonable does not prove the converse, i.e., that such penalties are reasonable. That is, the opponents to the KMC Petition fail to acknowledge that ILEC termination penalties can be -- and many are -- structured in such a manner as to be unreasonable. It is important for the Commission to recognize that ILEC termination penalties operate on a spectrum. While one end of that spectrum represents a reasonable commercial practice, the other represents the exercise of monopoly power designed to blunt the development of competition. It is the latter that demands Commission intervention.

The opponents of the KMC Petition attempt to draw the Commission's attention away from the severity and prevalence of this problem through a variety of frivolous and unfounded arguments.[8]

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7 See, e.g., Comments of Alaska Communications Systems at 2; Allegiance Telecom, Inc. at 3; Joint Comments of ALTS, Net2000 and Teligent at 2-3; Opposition of Bell Atlantic at 3; Comments of BellSouth Corporation at 2; Joint Comments of Choice One Communications and Hyperion Telecommunications, Inc. at 2; Joint Comments of CTSI, Inc. and RCN Telecom Services, Inc. at 2; Comments of GTE at 2-3; Qwest Communications Corporation at 4; Southwestern Bell Telephone, et al. at 2; Sprint Corporation at 3; and U S WEST at 2.

8 For example, Bell Atlantic claims that providing a fresh look would operate as unlawful retroactive rulemaking. Opposition of Bell Atlantic at 8. BellSouth raises the unconstitutional takings issue in conjunction with fresh look -- an argument nearly exhausted by frivolous ILEC

The opponents to the KMC Petition also claim that the Commission lacks the authority under Section 253 to act on the Petition.[9] Joint commenters adequately and extensively explained the variety of jurisdictional bases for the Commission to provide fresh look opportunities for excessive ILEC termination penalties.[10] Included in that analysis was an explanation of the Commission's authority to act pursuant to Section 253. Other sources of jurisdiction are available, as well.[11] Whether it invokes Section 253 or some other basis for its authority, it is critical that the Commission remove these impediments to telecommunications competition.

Joint Commenters suggested a possible manner of accomplishing this goal.[12] In its broadest form, the proposal

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invocation. Comments of BellSouth Corporation at 7. Southwestern Bell claims that fresh look would discriminate against ILECs vis-a-vis CLECs (Comments of Southwestern Bell et al. at 9) in an apparent attempt to resurrect a variation of the basis for its unsuccessful challenge to the 1996 Telecommunications Act. See SBC Communications, Inc. v. F.C.C., 154 F.3d 226 (5th Cir. 1998).

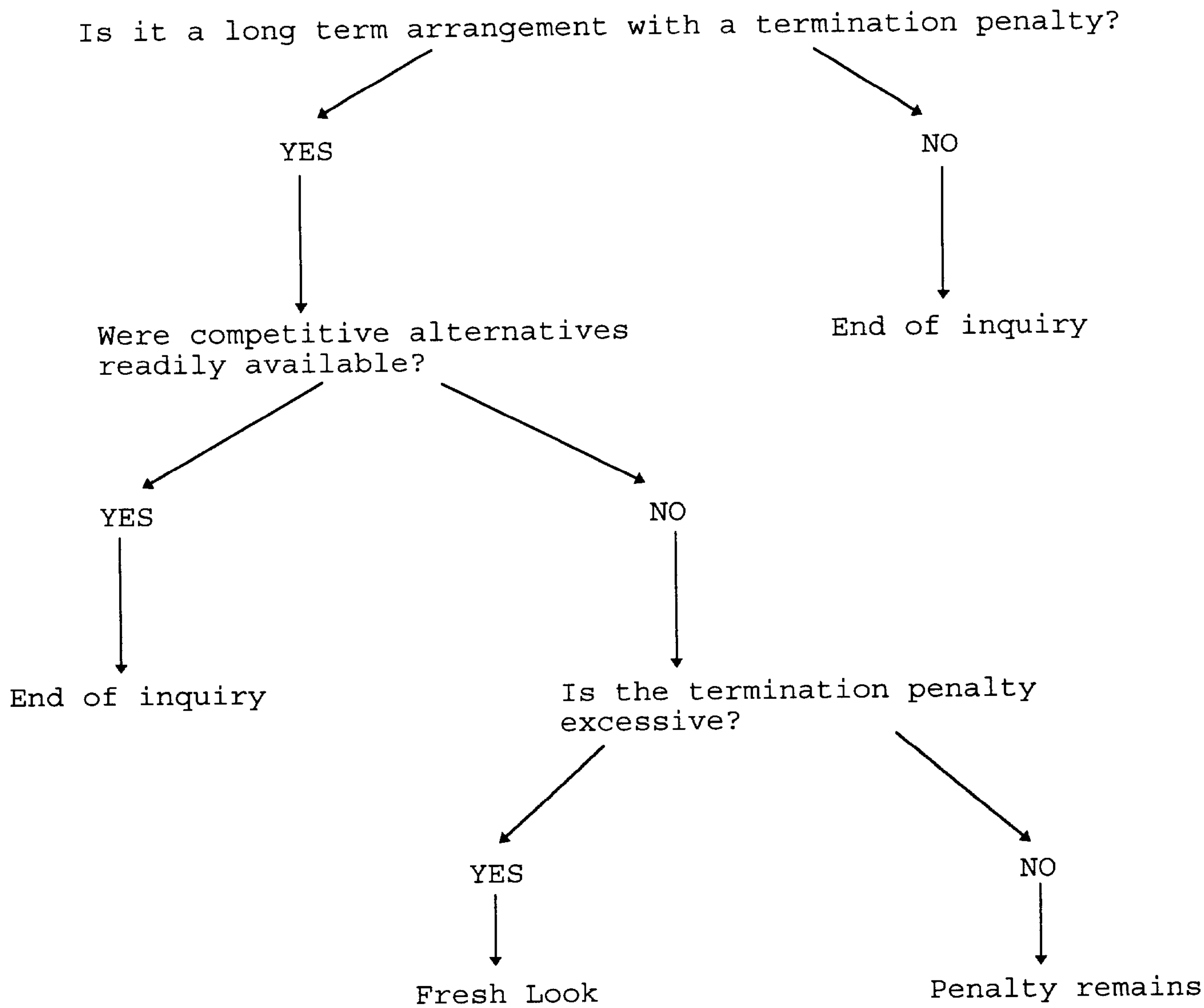
9 See, e.g., Opposition of Bell Atlantic at 6-7; Comments of BellSouth Corporation at 4; Comments of GTE at 9-10; and Comments of Southwestern Bell Telephone at 12.

10 Comments of ALTS, Net2000, and Teligent at 11-24.

11 For example, the Commission could provide a fresh look for excessive ILEC termination penalties that affect interstate communications pursuant to its authority over interstate communications. To the extent that the penalties affect both interstate and intrastate communications, the Commission's can invoke the impossibility doctrine as the basis for providing a fresh look at excessive ILEC termination penalties.

12 Id. at 5-7.

seeks to ensure that if customers do not have competitive alternatives readily available when entering into service arrangements with ILECs, that they not be forced to adhere to excessive termination penalties. In flow chart form, the analysis would proceed as follows:



- **Long-Term Arrangement:** The Commission could define a long term arrangement as one with a term of 180 days or more remaining under the arrangement, whether it be through tariff or contract. The Nevada Public Utilities Commission has suggested a similar trigger for fresh look opportunities.[13]

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13 See Fresh Look Rule, PUC Docket No. 98-12020, *Revised Proposed Regulation of the Public Utilities Commission of Nevada* (Nev. PUC, presented for 7/26/99 hearing).

- **Readily Available Competitive Alternatives:** As suggested by the Joint Comments, the federal Section 271 process could be used as a proxy for the first of two essential phases of readily available competitive alternatives.[14] In other words, it can be presumed that customers entering into BOC service arrangements with termination penalties prior to federal 271 approval lacked readily available competitive alternatives.[15] In phase two, once the BOC has received federal 271 approval, it can petition the relevant state commission and make the requisite showing for the State commission to find that the ILEC service at issue is subject to sufficient competition within the State to justify allowance and enforcement of ILEC termination penalties on a going-forward basis. Non-BOC ILECs will be subject only to the second phase.
- **Excessive termination penalty:** The Commission could conclude that an ILEC termination fee must not exceed the difference between the amount the customer has already paid under the contract and the charges the customer would have paid if the customer had entered into a contract for the term actually used. ILEC termination penalties that exceed this amount (excluding those non-recurring, unrecovered ILEC investments

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14 Comments of ALTS, Net2000, and Teligent at 5-6.

15 Joint Commenters agree with Sprint's suggestion of excluding from this process those contracts executed subject to a competitive bid situation after August 8, 1996. <u>See</u> Comments of Sprint Corporation at 6.

reasonably made in reliance on the long-term contract) could be considered excessive.

- **Fresh look opportunity:** The Commission could provide a fresh look opportunity for excessive ILEC termination penalties. This fresh look would not excuse entirely the customer's payment of a termination penalty. Instead, it would allow a customer to avoid payment of that amount that is deemed excessive. Following the proposal of the Nevada Public Utilities Commission, the FCC could allow a customer to exercise the fresh look opportunity by paying the lesser of: (a) the amount owed under the termination provision of the customer's existing contract with the ILEC; or (b) the difference between the amount the customer has already paid under the contract and the charges the customer would have paid if the customer had entered into a contract for the term actually used.[16] The ILEC should also be permitted to recover non-recurring unrecovered investments reasonably made in reliance on the long-term contract.

The supporters of the KMC Petition have demonstrated that excessive ILEC termination penalties are stifling the development of telecommunications competition. Joint commenters' proposal represents a workable solution that permits the legitimate and reasonable uses of termination penalties. Implementation of this

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16 See Fresh Look Rule, PUC Docket No. 98-12020, *Revised Proposed Regulation of the Public Utilities Commission of Nevada* (Nev. PUC, presented for 7/26/99 hearing).

option is fully within the Commission's authority. Joint Commenters urge the Commission to grant KMC's Petition consistent with the comments in support of that Petition and to eliminate the imposition of excessive ILEC termination penalties in a manner similar to the proposal suggested herein.

Respectfully submitted,

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I, Rosalyn Bethke, hereby certify that, on June 18, 1999, copies of the foregoing "Joint Reply Comments" of The Association for Local Telecommunications Services, NET2000 Communications, Inc., and Teligent, Inc. were delivered by first-class mail or by hand delivery, as indicated, upon the following:

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